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COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N.W.

P.O. BOX 7566

WASHINGTON, D.C. 20044-7566

(202) 662-6000

TELEFAX: (202) 662-6291

TELEX: 89-593 (COVLING WSH)

CABLE: COVLING

WRITER'S DIRECT DIAL NUMBER

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE 071-495-5655
TELEFAX: 071-495-3101

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BRUSSELS CORRESPONDENT OFFICE
44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE: 32-2-512-9890
TELEFAX: 32-2-502-1598

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November 2, 1994

BY MESSENGER

Mr. Andrew S. Fishel, Managing Director
William E. Kennard, Esq., General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

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Re: Reply of APC to Pacific Telesis Response
Notice of Ex Parte Violation
Gen. Docket 90-314

Dear Messrs. Fishel and Kennard:

Pacific Telesis' ex parte violations that were documented in the notification filed by American Personal Communications ("APC") on October 17, 1994, were so clear-cut as to be self-explanatory. We must, however, respond to three matters in Pacific Telesis' October 27 "reply":

1. Pacific Telesis claims that there is "no way" its CEO could discuss the proposed GATT legislation to a USTA dinner audience including all five Commissioners without addressing the "merits of the underlying [preference] awards" (p. 1, emphasis in original). This assertion is nonsense. Even Pacific Telesis has given the lie to this claim. In its lengthy testimony before the House Committee on Energy and Commerce on October 5, 1994, Pacific Telesis did not even once address the merits of APC's preference request. In fact, at that hearing, Pacific Telesis asserted that it was "not challenging the fact that [the FCC] chose three people and they didn't choose us." It was only when key Commission personnel were in the audience that Pacific Telesis' CEO chose to address the merits of APC's preference request, while petitions for reconsideration were still pending.

Whether the Commission should deny or grant a particular preference request is entirely separate from the two issues Pacific Telesis claims to oppose in the legislation -- whether the bill should require payments from the pioneers in an amount even greater than the GATT legislation, which OMB scores at \$1.498 billion; and whether the bill should end Pacific Telesis' interminable barrage of appellate court

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filings designed to delay and disadvantage the pioneers. These issues have nothing to do with whether APC's preference was "unearned," a theme that was repeated several times in the address by Pacific Telesis' CEO. Addressing the merits of particular preference requests that are pending on reconsideration to an audience including the five Commissioners is a tactic that would be necessary only if the speaker wished to persuade the Commission to take adverse action on those preference requests. And that tactic goes to the heart of the ex parte prohibition.

2. Pacific Telesis' attempt to wrap itself in the First Amendment falls grossly wide of any constitutional mark, and it proves too much.^{1/} The Commission's ex parte rules do not stop Pacific Telesis from "speaking" on any matter; they simply channel presentations going to the merits of restricted proceedings into either oral presentations when all parties have an opportunity to participate or in written presentations served on all parties to assure fairness.

Nor is there any reasoned constitutional distinction between a presentation on these impermissible topics in a "private" presentation to the Commissioners behind closed doors or a "public" presentation to the Commissioners from a podium. Accepting Pacific Telesis' argument that it has a First Amendment right to make an ex parte presentation to the Chairman and Commissioners on the merits of a restricted proceeding would compel a conclusion that all ex parte restrictions are unconstitutional on their face -- for both "private" and "public" discussions -- because they all limit topics of speech. The plain fact is that restricted matters, like adjudications, must be decided strictly on the basis of a

^{1/} Pacific Telesis disingenuously notes that "APC does not deny" its First Amendment claims or its claims based on APC's newspaper advertisement. APC did not address these matters in its October 24 preliminary response only because it had no way of knowing that Pacific Telesis had raised them -- Pacific Telesis served APC by regular mail from San Francisco, despite the Washington address on the pleading itself, and that pleading was not received by APC's Washington counsel until October 25. APC does not concede any point raised by Pacific Telesis.

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proper record rather than on the ex parte presentations of powerful opponents such as Pacific Telesis.^{2/}

3. Pacific Telesis pretends to be unable to divine a difference between (1) APC purchasing a newspaper advertisement to discuss the proposed legislation and (2) Pacific Telesis' CEO speaking to the merits of a restricted proceeding directly to the Commission.

APC was forced to place a newspaper ad to defend itself against a full-page Pacific Telesis ad published the day prior that was characterized by leading government officials as "particularly misleading," a "combination of misleading statements and untrue statements," and "off by a factor of 100."^{3/} In defending itself against Pacific Telesis' attack ad, APC's audience was not the Commission.

^{2/} Pacific Telesis' analogy to FCBA speeches concerning matters subject to a Sunshine Agenda is irrelevant because those speeches fall under the exception for "communications regarding 'general industry problems,' so long as they do not deal with the merits of the restricted proceeding." Ex Parte Communications and Presentations in Commission Proceedings, Report and Order, 2 F.C.C. Rcd. 3011, 3014 (1987) (emphasis added). In this case, in contrast, no exception applies because the remarks did deal with the merits of a restricted proceeding. As the Commission explained in proposing its rule regulating ex parte communications in social settings "outside normal business or agency-related channels":

[I]f presentations are made by other persons who have a direct or clearly identifiable interest in the matter or who, because of background or expertise in the subject matter, are likely to have an influence on decisionmakers, such presentations properly are subject to the rules' prohibitions.

Ex Parte Communications and Presentations in Commission Proceedings, FCC 86-284, slip op. at 8 (Gen. Docket 86-225, July 9, 1986).

^{3/} Hearing before Committee on Energy and Commerce, Subcommittee on Oversight and Investigations and Subcommittee on Telecommunications and Finance, Oct. 5, 1994 (comments of Rep. Oxley, Ass't Sec. Irving, and Chairman Dingell).

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There is a real and obvious difference between general statements in a newspaper report addressing legislative issues and read by millions, and specific references to the merits of APC's preference directly to an audience that includes Commission decisionmakers.

The Commission should impose appropriate sanctions and ensure that other Pacific Telesis employees did not similarly commit other ex parte violations under Pacific Telesis' wacky view of the First Amendment or otherwise.

Respectfully submitted,



Jonathan D. Blake
Kurt A. Wimmer

Attorneys for American
Personal Communications

cc: Gen. Docket 90-314
Alan F. Ciamporzero, Esq. (by hand)
Courtesy copies: Parties of record
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